



Wiley Rein & Fielding LLP

RECEIVED
FEC MAIL
OPERATIONS CENTER

2006 OCT 30 P 3:39

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202 719 7000
FAX 202 719 7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703 905 2800
FAX 703.905 2820

www.wrf.com

October 30, 2006

Jan Witold Baran
202.719.7330
jbaran@wrf.com

BY HAND DELIVERY

Mr. Jeff S. Jordan
Supervisory Attorney
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 5819 (U.S. Chamber of Commerce)

Dear Mr. Jordan:

This office represents the U.S. Chamber of Commerce ("Chamber"). Please find enclosed an executed Statement Of Designation Of Counsel in the above-captioned MUR. The purpose of this letter is to enter our appearance, acknowledge receipt of an incomplete copy of a complaint, and to object to certain procedural violations by the FEC during the initiation of this MUR.

FACTS

On September 19, and again on September 20, 2006, The Honolulu Advertiser publicized accusations that the Chamber violated the law by running stories about a complaint that was going to be filed with the FEC against the Chamber. See Derrick DePledge, *FEC to investigate calls for Case*, Honolulu Advertiser, Sept. 19, 2006; Jerry Burris, *Awkward campaign bumps could unhinge Case's efforts*, Honolulu Advertiser, Sept. 20, 2006.

The FEC received a complaint against the Chamber by James J. Bickerton and Barry A. Sullivan ("Complainants"). The Office of General Counsel date-stamped the complaint on September 20 and prepared a cover letter to notify the Chamber dated September 22. The envelope in which these and other materials were forwarded to the Chamber was postmarked October 17. A copy of that envelope is enclosed. The Chamber's internal records indicate that it received the materials on October 24. The envelope was not addressed to any individual or to the Chamber's registered agent.

The materials consisted of a cover letter from the FEC, a written complaint, a description of the FEC's procedures for processing complaints, and a blank Statement Of Designation Of Counsel form. The Complainants stated that "a digital

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
1 2006 OCT 30 P 5:27

27044174891

Mr. Jeff S. Jordan

October 30, 2006

Page 2

recording [was] provided on CD with this complaint.” The Complainants asserted that the statements on the CD constitute prohibited express advocacy by the Chamber. Yet, the materials the FEC sent to the Chamber did not include a copy of that recording.

LAW

2 U.S.C. § 437g states:

Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint.

11 C.F.R. § 111.4(d) states:

The complaint should conform to the following provisions:

...

(3) It should contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction; and

(4) It should be accompanied by any documentation supporting the facts alleged if such documentation is known of, or available to, the complainant.

11 C.F.R. § 111.5(a) states:

Upon receipt of a complaint, the General Counsel shall review the complaint for substantial compliance with the technical requirements of 11 CFR 111.4 and, if it complies with those requirements shall within

27044174892

Mr. Jeff S. Jordan

October 30, 2006

Page 3

five (5) days after receipt notify each respondent that the complaint has been filed, advise them of Commission compliance procedures, and enclose a copy of the complaint.

ANALYSIS

In apparent violation of its own regulations and implementing statute, the FEC (1) failed to provide the Chamber with notice of the complaint within the five-day statutory period, and (2) still has not provided a complete copy of the complaint to the Chamber.

1. Failure to provide notice within the five-day period.

We object to the FEC failing to provide notice to the Chamber within the mandatory five-day period contained in 2 U.S.C. § 437g.

The FEC's own date-stamp indicates that it received the complaint on September 20, 2006. The FEC's cover letter accompanying the complaint is dated September 22. However, the enclosed copy of the envelope in which the materials were sent to the Chamber is postmarked October 17, almost an entire month after the FEC received the complaint. The Chamber did not receive the FEC notification until October 24.

"Section 437g is as specific a mandate as one can imagine" and "the procedures it sets forth—procedures purposely designed to ensure fairness not only to complainants but also to respondents—must be followed." *Perot v. Fed Election Comm'n*, 97 F.3d 553, 559 (D.C. Cir. 1996). These mandatory procedural requirements "bind the FEC's deliberations about, and investigation of, complaints." *Id.* at 558 (specifically citing the 5-day notice requirement and stating that the court "presume[s] this was done").

Shortly before the FEC received the complaint, press accounts publicized its filing and trumpeted the complainants' accusations that the Chamber had engaged in unlawful activity. Had the FEC provided the complaint to the Chamber within the five-day period, the Chamber could have timely mitigated this negative press by publicly rebutting the substance of the complaint.

27044174893

Mr. Jeff S. Jordan
October 30, 2006
Page 4

The “fairness” inherent in the statutory five-day notice requirement – as noted by the D.C. Circuit in *Perot* – is clearly meant to provide respondents with an opportunity to meaningfully and promptly address public accusations of violations. The FEC’s almost month-long delay deprived the Chamber of this statutorily conferred benefit.

2. Failure to provide a complete copy of the complaint.

The FEC’s failure to provide a complete copy of the complaint prevents the Chamber from substantively responding to the complaint. Until the FEC provides the Chamber with a copy of the recording that is incorporated into – and is the basis of – the complaint, the Chamber cannot exercise fully its statutory right to demonstrate to the Commission that no action should be taken on the complaint.

The complaint states that the Chamber violated the campaign finance laws by sponsoring an automated phone call expressly advocating the election of a federal candidate. This legal conclusion is based on content reproduced in “a digital recording ... provided on CD with th[e] complaint.” Yet the FEC did not provide the Chamber with a copy of that recording.

The FEC’s failure to provide a copy of the recording violates the Commission’s own rules that require it to transmit a complete copy of a properly filed complaint to the respondent. *See* 11 C.F.R. §§ 111.5(a), 111.4(d). These rules appear to have been promulgated to allow respondents a meaningful opportunity to exercise their statutory right to demonstrate that no action should be taken on a complaint filed against them.

The gravamen of the complaint is that the Chamber violated the law by speaking certain words constituting prohibited express advocacy. The express advocacy test turns on the words actually used. The complaint does not otherwise provide the words the Chamber supposedly spoke. Thus, the CD is the heart of the complaint. Without a copy of the CD, the Chamber does not know what words were used and cannot show that those words do not constitute express advocacy. The FEC’s failure to provide a copy of the recording frustrates the Chamber’s statutory right to demonstrate to the Commission that no action should be taken on the basis of the complaint.

27044174894

Mr. Jeff S. Jordan
October 30, 2006
Page 5

CONCLUSION

We request a complete copy of the complaint, specifically, a copy of the CD containing the automated phone call recording that was part of the complaint. Within fifteen days of receiving a complete copy of the complaint, we intend to respond and demonstrate to the Commission that no action should be taken. In so doing, we expressly preserve our objection to the above-described prejudicial procedural violations committed by the FEC during the initiation of this matter.

Sincerely,



Jan Witold Baran

Enclosures

27044174895



FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

STATEMENT OF DESIGNATION OF COUNSEL
Please use *one* form for each Respondent/Client.
FAX (202) 219-3923

MUR # 5819

NAME OF COUNSEL: Jan W. Baron

FIRM: Wiley, Rein & Fielding

ADDRESS: 1776 K Street, N.W.

Washington, DC. 20006

TELEPHONE- OFFICE (202) 719-7330

FAX (202) 719-7049

The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

10/25/06
Date

[Signature]
Respondent/ Client Signature

Senior VP & General Counsel
Title

RESPONDENT/CLIENT: US CHAMBER OF COMMERCE
(Please Print)

MAILING ADDRESS: Judith Richmond, VP & Assoc. General Counsel
1615 H St., N.W., Washington, D.C 20062

TELEPHONE- HOME () _____

BUSINESS (202) 463-5337

Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.